IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-391

UNITED STATES OF AMERICA,

Respondent,

*versus*

GEORGE F. BROWN,

Petitioner.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E. DREW MCKINNIS
McKINNIS, JUBAN & BEVAN
1933 Wooddale Boulevard
Baton Rouge, Louisiana 70806

*Franklin Press, Inc.* Baton Rouge, La.

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Cases:**







**Other Authorities:**

IN THE

# SUPREME COURT OF THE UNITED STATES

---

October Term, 1978

---

## No.

---

UNITED STATES OF AMERICA,

Respondent,

*versus*

GEORGE F. BROWN,

Petitioner.

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the case reported as *United*

*States of America v. George F. Brown*, 574 F.2d 1274 (5th Cir. 1978).

## JURISDICTION

This petition for certiorari seeks review of a conviction, affirmed in part and remanded in part with instructions. The decision was rendered on June 13, 1978 (copy appended). The application for rehearing was denied on August 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1), and under Rule 19 of the Rules of this Court.

## QUESTIONS PRESENTED

1. Does fundamental fairness call for an evidentiary hearing on defendant's motion to dismiss for grand jury abuse where defendant alleges:

(a) Only hearsay evidence was presented; and where—

(b) The hearsay presented was carefully screened to withhold those portions of the hearsay statements favorable to the defendant; and where—

(c) The witnesses whose testimony was summarized were readily available to testify in person.

2. In an income tax case, is reversal required where the Government has suppressed favorable evidence consisting of IRS audit and work papers stemming from its in-depth audit of defendant's tax returns for the years in question?

3. When the Government conceals its immunity grant to a key prosecution witness, is it reversible error to deprive the defense of the opportunity outside the presence of the jury



to make proper inquiry concerning promises made to the witness?

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States providing for grand jury indictments implicitly proscribes "unfairness" in the grand jury presentation.

## STATEMENT OF THE CASE

The Falstaff and Dixie Brewing Companies decided to seek relief from what they believed to be a tax oppressive structure in the Louisiana law directed toward breweries located in the State of Louisiana. They discussed this matter with Louisiana officials and received a favorable reaction. Similar legislation affording relief to small breweries had been passed in other states.

After carefully laying the ground work with state officials, the brewers went to the Beer Industry League of Louisiana and its director for the purpose of drafting the legislation and following it through the legislative committees. That was a natural referral because, at the time, Dixie and Falstaff were contributing about one-fourth of the total expense of operations of the Beer Industry League. The defendant Brown was the director of the League.

After the legislation was passed, Dixie elected to transmit $15,000 in connection with its passage. Although it was not the intention of Dixie that the defendant George Brown was to receive any economic benefit, he was charged with the duty of making delivery of the $15,000 payment. The Dixie official testified that he accompanied Mr. Brown to a Baton Rouge

hotel where Mr. Brown absented himself for a few minutes, returning without the money. The Dixie official further testified that Mr. Brown did not have the money on him upon his return because he would have been able to see it because of its bulk.

During the next calendar year, Falstaff decided to transmit a similar sum in connection with the same legislation. Falstaff likewise did not intend that George Brown receive it for any services rendered.

The defendant Brown was not a direct employee of the two brewers, but his position made him subject to their wishes. He was in no position to control passage of the desired legislation. There is no evidence to indicate that he received any economic benefit whatever.

A New Orleans Federal Grand Jury returned indictments (not involved here) alleging that illegal payments made by Dixie and Falstaff, each in the amount of $15,000, were part of a conspiracy to use interstate facilities in violation of 18 U.S.C. § 1952. That indictment had as its premise that the payments were directed to parties other than the defendant, George Brown.

The Government chose to issue a simultaneous indictment (the one involved here) growing out of the same factual circumstances. This indictment charges two counts of failing to report income under 26 U.S.C. § 7206(1) and is based on the inconsistent premise that the payments were directed to George Brown.

The live witnesses and direct testimony was presented only to the New Orleans Grand Jury. Selected summaries of



that testimony were presented to the Baton Rouge Grand Jury. Defendant was indicted solely on the basis of selective summaries of hearsay statements.

The principal Falstaff witness made two appearances before the New Orleans Grand Jury. In his first appearance, he gave materially false testimony. It later developed (the defense learned for the first time on cross-examination) that the witness had been granted immunity and brought back to the New Orleans Grand Jury for further testimony.

On the same day that the New Orleans Grand Jury that had investigated the matter for months returned its indictment, the Government sent one of its agents to the Baton Rouge Grand Jury to summarize testimony given before the New Orleans Grand Jury. A rubber stamp approval was sought from the Baton Rouge Grand Jury and an indictment returned the same day. No doubt, the false testimony given to the New Orleans Grand Jury was concealed from the Baton Rouge Grand Jury with the effect that the Grand Jury in Baton Rouge had no reason to question the veracity of the witness. Promises of immunity were almost certainly not presented to the Grand Jury in Baton Rouge.

The defendant sought an evidentiary hearing to establish the unfairness of the total hearsay presentation submitted to the grand jury, and upon denial by the court, an offer of proof was placed in the record to establish the basis for the defense position.

## ARGUMENT

### Grand Jury Abuse

The decision of the Court below relies heavily on the deci-

sions in *Costello v. U.S.*, 350 U.S. 359 (1956) and *United States v. Cruz*, 478 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973). The *Costello* decision demonstrates that a defendant can be convicted where only hearsay evidence was presented to the grand jury. The *Cruz* decision is in agreement but with the reservation that the court will not condone the use of hearsay where the integrity of the grand jury proceedings have been impaired.

The fundamental error in the decision below is that it treats the grand jury issue as merely "admissibility of hearsay" rather than "fundamental fairness in presentation of hearsay testimony."

The key Falstaff witness made two separate appearances before the New Orleans Grand Jury and gave two totally inconsistent statements. Most certainly **only** the statement helpful in obtaining the tax indictment was presented to the Baton Rouge Grand Jury. Most certainly the fact that he had been granted immunity was not presented to the Grand Jury. (The government even suppressed to the defendant this grant of immunity, it being developed for the first time on cross-examination of the witness).

When selective summarization of testimony before another grand jury is used, there must be some procedure to assure defendant of a fair grand jury presentation under the Fifth Amendment. That procedure is an evidentiary hearing. The defense requested one in this case and made an offer of proof. Alternatively, the defense requested the Court to review the grand jury testimony, *in camera*, to determine whether there was any substantial evidence to support the indictment. All motions were denied. If this case is allowed to stand, it will



mean that allegations of grand jury abuse are not discoverable that the prosecutor has *carte blanche* authority to present misleading and inaccurate testimony to secure an indictment; and that there is no right to a "fair" grand jury presentation before indictment.

The decision below is in conflict with the concept adopted by the Second Circuit in the case of *U. S. v. Umans*, 368 F.2d 725 and *U.S. v. Estepa*, 471 F.2d 1132.

The decision below also ignores the observation in *U.S. v. Dunham Concrete Products, Inc.*, 475 F.2d 1241 (5th Cir. 1973) that the use of carefully prepared and highly selective summaries is separate and apart from the use of hearsay evidence and must be judged as to its fundamental fairness. The decision below refuses to address the fundamental fairness requirement. Indeed, the decision as it stands negates the existence of any such requirement in contradiction of pronouncements made in *U.S. v. Braniff Airways, Inc.*, 428 F.Supp. 579; *U.S. v. Carcaise*, 442 F.Supp. 1209; *In Re Grand Jury Investigation of Banana Industry*, 214 F.Supp. 856; and *In Re May 1972 San Antonio Grand Jury*, 366 F.Supp. 522.

This case presents an excellent opportunity for this Court to set the guidelines in a very important area of criminal law. There has been much criticism of prosecution tactics in obtaining indictments by virtue of slanted, hearsay evidence. In fact, in the Court below, a motion was filed by 40 individual and corporate defendants seeking leave to file, out of time, an *amicus* brief on behalf of Brown. The motion was denied.

**The Government's Suppression of Favorable Evidence (The Tax Audits)**

Defendant was charged with failure to report income. The

Government made an in-depth audit of his financial affairs for the two years in question, including spending habits, bank balances, and other matters that would indicate how much income defendant had at his disposal. The Government also had ready access to the names and addresses of its investigators who compiled the data. In appropriate pretrial motions, defendant requested that the Government produce:

> "The materials contained in the files of the Internal Revenue Service relative to its investigation of defendant for the calendar years 1974 and 1975 which negate or which may tend to negate the receipt of unreported income by the defendant in the amounts alleged in the indictment. Included in this request are materials relative to any net worth analysis by Internal Revenue Service and the reports of its agents as to defendant's spending habits."
>
> and
>
> "Any materials reflecting the name and current address of, and/or any statements given by, any person interviewed by agents of the Internal Revenue Service in connection with its investigation of defendant's 1974-1975 income tax returns, who either (1) was not called or put before the Grand Jury or (2) was called before the Grand Jury but will not be called as a witness at the trial."

No adequate defense could be structured without this vital information. Nevertheless, defendant's motions for production were denied.

It is implicit in the Fifth Circuit's decision that the trial court refusal to require the Government to produce the requested materials was error. The case has been ordered remanded for the trial judge to determine, *in camera*, whether



any extant exculpatory evidence, materials as to either guilt or punishment and within the possession of the Government, might have affected the outcome.

The repeated motions seeking production of the 1974-75 audit work papers in the Government's possession and the names and addresses of its investigators were specific requests within the meaning of *U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, and the failure of the prosecution to respond was inexcusable.

Obviously the requested materials would benefit either the defense or the prosecution. It is a well-settled presumption of law that if the evidence had been favorable to the Government, it would have produced the evidence at the trial and would have put the witnesses on the stand to prove the facts. Thus, if the Government's work papers showed that the defendant spent abnormally large sums of cash during the two years in question, or that he had bought luxury items he could not otherwise afford, or that he had entertained in a manner outside his reported income, or that he had unexplained large bank accounts not traceable to reportable income, or that he had indulged in any number of other spending habits, or if his net worth analysis was inconsistent with reported income—such evidence would have been used against defendant at the trial. On the other hand, if the Government's investigation negated the existence of these possibilities, its audit information, along with the witnesses to corroborate same would be vitally needed in preparing a proper defense. Both the decision in chief and the dissent missed the point in this regard. If defendant did not spend the $30,000 for any personal benefit, it is likely that his understanding with the brewers was that the money was never his to spend

in the first place. And, if he had the benefit of this corroborative evidence suppressed by the prosecution, he would likely have taken the stand in his own defense to explain his position as a courier. Without such relevant support existing in the Government's own files, it would have been defendant's word alone had he taken the stand.

The relevance of the requested information is therefore obvious. As pointed out in the dissent, an *in camera* inspection cannot adequately protect defendant's rights. Defendant was entitled to this evidence in advance of trial—not after the trial. But, under the Court's present ruling, we may never see the evidence at all. Apparently, there will be no appellate review from the future decision of the trial judge. The defense will have no right to determine whether the Government has produced all of the requested documents. The defense will have no right to interrogate the government investigators and analysts. The names and addresses of these people continue to be suppressed by the Government.

On its very face, the suppression by the Government of its in-depth audit and work papers for the years in which defendant is charged with failure to report income is unfair and unjust.

It would also be inequitable to affirm the conviction in view of the error. This would relegate defendant to his remedy under Section 2255. But there is no guarantee the defendant might not serve his six month sentence before a final decision could be reached on post-conviction relief. The constitutional safeguards of fair trial will have been denied in the case at bar if the conviction is affirmed in the face of obvious and substantial error. Post-conviction relief to correct error clearly



recognized in the decision of this Honorable Court is not an adequate safeguard.

**Concealment of the Immunity Grant**

The trial court's initial pretrial discovery order required the government to furnish all immunity materials to the defense. The defense thereafter continued to question the prosecution (in formal motions) as to whether the key Falstaff witness had been granted immunity. The reason stemmed from the fact that the Falstaff witness was undoubtedly the most deeply involved personally of all of the brewer officials and it seemed unlikely that he would have willingly testified to his own crime without promises. His deep personal involvement came into much clearer focus when the defense was presented under the *Jencks* rule with testimony given on two separate appearances before the New Orleans Grand Jury. His first statement had contained materially false testimony.

The Government came to trial continuing to maintain that Gregg had been promised nothing. At the beginning of cross-examination, he admitted the contrary was true and that during the period between his first testimony and his second testimony, he had been immunized from prosecution. When this was determined for the first time on cross examination, we moved that his testimony be stricken, alternatively for a mistrial, and finally at the very least, for an out-of-jury hearing. We were absolutely entitled to the latter to prepare for cross-examination. Contrary to the conclusion reached in the present decision, the defense did not have "every opportunity to present" the immunity matters to the jury. We did not know then, and we do not know now, the extent of the promises made by the Government to this key witness. We have only the version of the witness and it is incomplete. It is

incomplete because cross-examination had to be conducted with caution since we did not know what the facts were. It is standard procedure not to ask adverse witnesses questions that can lead to unfavorable answers that cannot be disproved. This caution naturally impaired cross-examination. To this day, we have not been furnished by the Government the immunity materials relative to the witness, although they were specifically requested in the first pretrial motions filed.

There can be no question but that the evidence of the grant of immunity was material, and its non-disclosure was violative, not only of the court order, but also of the due process principle enunciated in *Brady*. The *Brady* rule applies not only when the evidence relates to matters of substance but also to matters relating to the credibility of a government witness. *U.S. v. Geraid*, 491 F.2d 1300 (1974). We will recall that the witness involved is the one who had given false testimony in his first sworn Grand Jury testimony in New Orleans.

Whenever the "reliability of a given witness may well be determinative of guilt or innocence," *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173 (1959), withholding of evidence relating to the witness' credibility justifies a new trial. *Giglio v. U.S.*, 92 S.Ct. 763 at 766, 405 U.S. 150 (1972).

This rule applies whether the "nondisclosure was a result of negligence or design" because the "prosecutor's office is an entity, and as such it is the spokesman for the government." *Giglio, supra*. The worry of the courts when the constitution is thus violated is "not that law enforcers are breaking the law, but that innocent people may be convicted." *Levin v. U.S.*, 408 F.2d 1209.



This proposition was further substantiated in *U.S. v. Pope*, 529 F.2d 112 (9th Cir., 1976) and in *DeMarco v. U.S.*, 94 S.Ct. 1185, 415 U.S. 449 (1974), where evidence of the witness' plea bargain was withheld from the defense, mandating a new trial.

## CONCLUSION

For the reasons stated above, defendant's conviction should be reversed. The sealed, confidential report on sentencing will reveal that subsequent to the trial, the defendant was subpoenaed back to the New Orleans Grand Jury, granted immunity and interrogated concerning the two payments of $15,000 allegedly made by the Falstaff and Dixie Brewers. That report will also show that the defendant took a lie detector test which showed that he had testified with absolute truthfulness when he stated that he made deliveries of the two payments in accordance with his instruction from the brewery officials. He did not testify at the trial, but it is likely that he would have done so if the defense had had the corroborative evidence suppressed by the Government.

Respectfully submitted,

E. DREW MCKINNIS
McKINNIS, JUBAN & BEVAN
1933 Wooddale Boulevard
Baton Rouge, Louisiana 70806

## CERTIFICATE

I hereby certify that a copy of the foregoing petition has been mailed to opposing counsel of record on this 7th day of September, 1978.

E. Drew McKinnis



## APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

*versus*

GEORGE F. BROWN,
Defendant-Appellant

No. 77-5607

**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**
**JUNE 13, 1978**

Defendant was convicted in the United States District Court for the Middle District of Louisiana, at Baton Rouge, E. Gordon West, J., for receiving payments which he failed to report on his income tax return, and he appealed. The Court of Appeals, Skelton, Senior Judge, Court of Claims, sitting by designation, held that: (1) indictment was not subject to dismissal or grounds that it was based on hearsay evidence or that Government failed to disclose evidence bearing on the credibility of witnesses; (2) Court of Appeals would not review the sufficiency of evidence before the grand jury on which the indictment was based, but (3) in determining whether Internal Revenue Service audit was material and should have been disclosed, trial court should have first examined and considered the contents of the audit.

Affirmed in part and remanded in part with instructions.

Alvin B. Rubin, Circuit Judge, filed opinion concurring in part and dissenting in part.

**1. Indictment and Information Key 10.2(2)**

Indictment was not subject to dismissal on ground that

it was based on hearsay evidence of a government agent who summarized evidence which had been presented to an earlier grand jury.

**2. Indictment and Information Key 10.1(4)**

The Government is under no duty to present to grand jury evidence bearing on the credibility of witnesses, and thus failure to advise indicting grand jury that a witness had given inconsistent statement to another grand jury and that witnesses whose statements were summarized for the grand jury had been granted immunity did not affect the validity of the indictment.

**3. Indictment and Information Key 10.2(7)**

Court of Appeals would not review the sufficiency of evidence before grand jury on which indictment was based.

**4. Criminal Law Key 627.9(5)**

Even if transcript of defendant's testimony before grand jury should have been furnished to him earlier than two days before trial, there was no error in refusing to grant mistrial or continuance where defendant did not show that he was prejudiced thereby, especially where the Government did not use the transcript in trial.

**5. Criminal Law Key 700**

Test of whether evidence is material and should have been disclosed is whether the evidence might have affected the outcome of the trial.

**6. Criminal Law Key 700**

In prosecution for failing to report certain payments received by defendant on his income tax return, question of whether Internal Revenue Service audit was material and should have been disclosed should have been determined by the trial court only after it examined and considered the contents of the audit, despite contention that defendant's net worth analysis and spending habits information could not have negated or tended to negate his receipt of unreported income. 26 U.S.C.A. (I.R.C. 1954) § 7206 (1); Fed. Rules Crim. Proc. rule 16, 18 U.S.C.A.



---

Appeal from the United States District Court for the Middle District of Louisiana.

Before SKELTON,* Senior Judge, and FAY and RUBIN, Circuit Judges.

SKELTON, Senior Judge.

The appellant, George F. Brown, was indicted by a Federal Grand Jury in Baton Rouge, Louisiana for receiving $15,000 from Dixie Brewing Company in 1974 and $15,000 from Falstaff Brewing Company in 1975, in connection with the passage of legislation by the Louisiana Legislature favorable to breweries, and failing to report such payments on his income tax returns, all in violation of 26 U.S.C. § 7206(1).[1]

Appellant was not a member of the Legislature, but was

---

* Senior Judge of the United States Court of Claims, sitting by designation.

1. 26 U.S.C., § 7206(1) provides:

"§ 7206. Fraud and false statements

"Any person who—

"(1) Declaration under penalties of perjury.—willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852."

the Executive Director of the Beer Industry League of Louisiana and, as such, was in a position to influence legislation relative to breweries. These payments were first investigated by a Federal Grand Jury in New Orleans in connection with a conspiracy indictment (not involved in this appeal) returned against appellant and others. Later, the Government sent an agent before a Federal Grand Jury in Baton Rouge who summarized the evidence presented to the Grand Jury in New Orleans. No other witness appeared before the Baton Rouge Grand Jury. Thus, the indictment in the instant case was based solely on hearsay testimony, which is one of the circumstances complained of by appellant in this appeal.

The appellant was tried before a jury on a two-count indictment involving the two payments, and was found guilty on both counts by the jury. He was sentenced by the court on each count to a term of three years on condition that he be confined in a jail-type institution for 180 days, with suspension of the remainder of the sentence, to be followed by probation for 3 years beginning with his release from confinement, the sentences to run concurrently. The appellant then appealed to this court. We affirm, subject to the remand of a part of the case to the trial court with instructions, as set forth below.

The appellant filed pre-trial motions for discovery and to dismiss the indictment in which he complained of the indictment being based on hearsay evidence, and also alleging that the integrity of the grand jury proceedings had been impaired by the following incidents and circumstances:

(1) Failure to advise indicting grand jury that the witness Gregg had given inconsistent testimony in his two appearances before earlier grand jury in New Orleans;

(2) Failure to advise grand jury that the witnesses whose statements had been summarized before them had been immunized;



(3) That the summarized witnesses' statements did not support the facts alleged in indictment, and;

(4) That no substantial evidence was presented to grand jury to warrant the indictment.

The court issued a Reciprocal Uniform Discovery Order but denied the motion to dismiss the indictment.

**[1]** Appellant's argument that the indictment should be dismissed because it is based on hearsay evidence is unpersuasive. By its very nature, the grand jury process is not an adversary proceeding. Its function is merely to determine if there is probable cause which warrants the defendant's being bound over for trial. A defendant has no right to require that the Government present all available evidence at this proceeding. The grand jury proceeding is a one-sided affair. The defendant is protected from such one-sidedness when, at the trial on the merits, he is "accorded the full protections of the Fifth and Fourteenth Amendments" and is "permitted to expose all of the facts bearing upon his guilt or innocence." *United States v. Chanen*, 549 F.2d 1306, 1311 (9 Cir. 1977).

Our decision in *United States v. Cruz*, 478 F.2d 408 (5 Cir. 1973) is dispositive of this argument. In that case we held that an indictment based on hearsay evidence is valid, saying:

"Grand Jury Hearsay

"The appellants contend that their grand jury indictment was invalid because it was based on the hearsay testimony of one investigating FBI officer rather than on direct testimony of informant-witnesses whom the government could have summoned to testify. In *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), the Court considered and rejected the contention that an indictment based exclusively on hearsay evidence is constitutionally invalid. This reasoning has been followed on many occasions by this court. See, e. g., *United States v. Bird*, 456 F.2d 1023 (5th Cir. 1972); *United States v. Klaes*, 453 F.2d 1375 (5th Cir. 1972); *United*

*States v. Howard*, 433 F.2d 1 (5th Cir. 1970), cert. denied, 401 U.S. 918, 91 S.Ct. 900, 27 L.Ed.2d 819 (1971)."

* * * * * *

"While the presentation of hearsay testimony of an investigating officer in lieu of readily available testimony by direct witnesses is by no means a preferred procedure, it is neither unconstitutional nor inherently wrong. In the absence of some showing that the integrity of grand jury proceedings has been impaired, an indictment even if based exclusively on such testimony will not be overturned on appeal." 478 F.2d 410-411.

We hold that the trial court did not abuse his discretion in denying appellant's Motion to Dismiss the indictment even though it was based exclusively on hearsay evidence.

**[2]** The complaint of appellant that the failure to advise the indicting grand jury that the witness Gregg had given inconsistent statements to another grand jury, and that witnesses whose statements were summarized for the grand jury had been granted immunity, bear on the credibility of such witnesses and is without merit. The Government is under no duty to present to a grand jury evidence bearing on the credibility of witnesses. This very question was decided adversely to appellant's contention by the Ninth Circuit Court of Appeals in *United States v. Chanen*, 549 F.2d 1306, 1311 (9 Cir. 1977) in which the court held;

"In *Loraine v. United States*, 396 F.2d 335 (9th Cir.), cert. denied, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968), the defendant moved to dismiss the indictment on grounds that the prosecutor, in his presentation to the grand jury, wilfully suppressed evidence that would undermine the credibility of three crucial witnesses before the grand jury. Apparently, one witness had a criminal record and was then under indictment in several other cases; another witness had been charged with embezzlement; the last had been enjoined from dealing in securities. We held that



" 'the trial court did not err in refusing to invalidate a federal indictment because the Government did not produce before the grand jury all evidence in its possession tending to undermine the credibility of the witnesses appearing before that body. Loraine was accorded the full protections of the Fifth and Fourteenth Amendments, when, at the trial on the merits, he was permitted to expose all the facts bearing upon his guilt or innocence.' "

In the instant case, appellant was furnished a list of all the witnesses, except Gregg, who had been granted immunity, two months before the trial. There was some evidence that appellant knew before the trial began that Gregg had been granted immunity. In any event, appellant knew of his immunity during the trial and thoroughly cross-examined him with reference to it. As to Gregg's prior inconsistent statements, appellant had every opportunity to present them to the jury and, in fact, did so. Appellant has not shown that he was prejudiced by the foregoing incidents. We find no error in this phase of the case. The appellant was given the full protections of the Fifth and Fourteenth Amendments when he was allowed to develop at the trial all of the facts bearing on his guilt or innocence.

**[3]** Appellant's arguments that the summarized statements of the witnesses did not support the facts alleged in the indictment, and that no substantial evidence was presented to the grand jury to warrant the indictment, are unpersuasive. In *United States v. Cruz, supra*, we held:

"Taking a different approach, the appellants argue that their indictments were invalid because the grand jury did not have before it any probative evidence, either hearsay or direct, upon which to base the indictments. However, the majority opinion in *Costello* also squarely rejected the contention that appellate courts may review the sufficiency of evidence supporting an indictment. 350 U.S. at 363, 76 S.Ct. at 408-409. The appellants' reliance on the concurring opinion of Mr. Justice Burton in *Costello* and on dicta in the pre-*Costello* opinion of this court,

*Friscia v. United States*, 5 Cir., 63 F.2d 977, 980, *cert. denied*, 289 U.S. 762, 53 S.Ct. 797, 77 L.Ed. 1505 (1933), is misplaced. We will not review the sufficiency of the evidence, if any, supporting the grand jury indictments in this case. See *Cohen v. United States*, 436 F.2d 586 (5th Cir.), *cert. denied*, 403 U.S. 908, 91 S.Ct. 2215, 29 L.Ed.2d 684 (1971); *United States v. Gower*, 447 F.2d 187 (5th Cir.), *cert. denied*, 404 U.S. 850, 92 S.Ct. 84, 30 L.Ed.2d 88 (1971)." 478 F.2d 408 at 412.

See also *United States v. Calandra*, 414 U.S. 338, 344-345, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *United States v. Boerner*, 508 F.2d 1064, 1068 (5 Cir. 1975); and *United States v. Newcomb*, 488 F.2d 190, 192-193 (5 Cir. 1974).

Accordingly, we will not review the sufficiency of the evidence before the grand jury on which the indictment was based.

**[4]** The appellant complains that the court erred in refusing to grant a mistrial or a continuance at the beginning of the trial based on the fact that he was not furnished a transcript of his testimony and that of certain prospective Government witnesses before the grand jury until two days before the trial. Even if the transcript should have been furnished to him earlier, appellant has not shown that he was prejudiced thereby. This is especially true since the Government did not use the transcript at the trial.

As stated above, the trial court issued a Reciprocal Uniform Discovery Order prior to the beginning of the trial. This order compelled disclosure of "all exculpatory evidence within the meaning of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967)." Appellant sought to supplement the order by written motion requesting that he be furnished with:

> "3. The materials contained in the files of the Internal Revenue Service relative to its investigation of defendant for the calendar years 1974 and 1975 which negate or which may tend to negate the receipt of unreported income by the defendant in the amounts alleged in the indictment. Included in this request are materials relative to any net worth analysis by Internal Revenue Service and the reports of its agents as to defendant's spending habits.
>
> "4. Any materials reflecting the name and current address of, and/or any statements of the Internal Revenue Service in connection with its investigation of defendant's 1974-1975 income tax returns, who either (1) was not called or put before the Grand Jury or (2) was called before the Grand Jury but will not be called as a witness at the trial."



The government answered this motion urging that this and other information sought is "beyond the scope of F.R.Cr.P. Rule 16 or has already been ordered disclosed." This motion was denied by the court. Appellant later urged substantially the same matters in a Motion to Dismiss, which was also denied. The appellant says that the court erred in denying these motions because the material he sought would have given him a "clean bill of health." He contended throughout the trial that the Falstaff and Dixie Brewing Companies that made the payments to him never intended that he was to receive any economic benefit from the money so paid, and that in fact he received no economic benefit therefrom.[2] The Government refused to furnish appellant any part of the Internal Revenue Service audit, saying that it was not relevant and the appellant was, therefore, not entitled to it.

The Government contends on this appeal that a substantial omission of income from has tax return by the appellant constituted a "material matter" within the contemplation of 26 U.S.C., § 7206, citing *Hoover v. United States*, 358 F.2d 87 (5 Cir. 1966), and that in a prosecution under the statute

---

2. The appellant did not testify, and there is no evidence who, if anyone, received an economic benefit from the payments.

the lack of a tax deficiency is neither essential nor relevant, citing *United States v. Jernigan*, 411 F.2d 471, 473 (5 Cir. 1969), *cert. denied* 396 U.S. 927, 90 S.Ct. 262, 24 L.Ed.2d 225, and *Shepps v. United States*, 395 F.2d 749 (5 Cir. 1968), *cert. denied* 393 U.S. 925, 89 S.Ct. 256, 21 L.Ed.2d 261.

The Supreme Court and this court have held:

> ". . . it is the power to dispose of income and the exercise of that power that determines whether taxable income has been received. *Helvering v. Horst* (1940) 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75; *Floyd v. Scofield* 5th Cir. 1952, 193 F.2d 594." *Sammons v. United States* (5th Cir. 1970) 433 F.2d 728 at 732.

See also *Corless v. Bowers*, 281 U.S. 376, 50 S.Ct. 336, 74 L.Ed. 916 (1930), and *Rutkin v. United States*, 343 U.S. 130, 72 S.Ct. 571, 96 L.Ed. 833 (1952).

**[5, 6]** In the instant case, the trial court charged the jury:

> "The test is whether or not the money was received together with unfettered control over the disposition of that money."

The appellant did not object to this charge. The Government says that the charge complies with the law and that the I.R.S. audit was not material or relevant to guilt or punishment. We cannot say in the present state of the record whether or not this is true, because we do not know what is contained in the audit. Evidence that is "material either to guilt or to punishment" should be disclosed under the "*Brady rule.*" See *Moore v. Illinois*, 408 U.S. 786, 794, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). The test for materiality of such evidence is whether the evidence "might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97 at 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976). Since the contents of the audit were not revealed to the trial judge, there was no way that he could



determine whether it contained exculpatory evidence that was material to guilt or to punishment in a way that might have affected the outcome of the trial. The Government argues that the appellant's net worth analysis and spending habits information would not have negated or tended to negate his *receipt* of unreported income.[3] This question should have been determined by the trial court only after he had examined and considered the contents of the audit. It is obvious that neither the trial court nor this court can decide cases in a vacuum, nor pass on facts that are not in the record.

We conclude that this case cannot be properly disposed of until the contents of the I.R.S. audit are revealed to the trial court in an in camera inspection and he has made findings and conclusions as to whether the audit contains exculpatory evidence that is material to the guilt or to the punishment of appellant, and which might have affected the outcome of the trial. This part of the case is remanded to the trial court for this purpose. We affirm the trial court's judgment as to the rest of the case.

The trial court is directed to make such in camera examination of the I.R.S. audit of appellant's tax records for 1974 and 1975, and in the event the court finds and concludes that the audit contains exculpatory evidence that is material to the guilt, or to the punishment of appellant, and which might have affected the outcome of the trial, the court is authorized and directed to take appropriate action in the case.

On the other hand, if the court finds and concludes that the audit does not contain such exculpatory evidence, he is authorized and directed to enter an order on the mandate affirming the judgment of conviction and sentence of appellant by the trial court.

---

3. The Government admits that such evidence might be exculpatory in a prosecution under 26 U.S.C., § 7201 for attempted tax evasion.

AFFIRMED in part and REMANDED in part to the Trial Court with instructions.

ALVIN B. RUBIN, Circuit Judge, concurring in part, dissenting in part:

As my brethren note, the defendant did not ask for, and was not entitled to receive under the discovery rules in criminal cases, Rule 16, F.R.Cr.Proc., and *Brady v. Maryland*, 1963, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, as interpreted in *United States v. Agurs*, 1967, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342, everything in the government's files. He sought that material that would "*tend to negate the receipt of unreported income by the defendant in the amounts alleged in the indictment.*" (Request 3) This is less vague than a request merely for exculpatory materials, but is hardly as specific as a request for a particular item. As to what was embraced in Request 4, set forth in full in the text of the opinion, we must conjecture, for the words used fail to convey any specific meaning to me; I cannot determine whether the defendant was seeking the names of witnesses, materials reflecting the names of witnesses, or Internal Revenue Service "statements," whatever those may be.

The failure to produce material specifically requested by the defense that is in fact available to the government may be ground for a new trial. But we must distinguish between such a dereliction and the prosecutor's failure merely to meet the constitutional duty, as interpreted in *Brady, supra*, and as further developed in *Agurs, supra*. If the prosecution has failed to produce exculpatory material not specifically requested by the defendant, the Constitution requires a new trial "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Agurs, supra*, 427 U.S. at 112, 96 S.Ct. at 2401, 49 L.Ed.2d at 355. If the prosecutor fails to respond to a specific request, one that gives "the prosecutor notice of exactly what the defense desire[s]," *Agurs, supra*, 427 U.S. at 106, 96 S.Ct. at 2398-2399, 49 L.Ed.2d at 351, "it



is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Agurs, supra*, 427 U.S. at 106, 96 S.Ct. at 2399, 49 L.Ed.2d at 351. *Agurs* does not, however, hold that every such default, however inexcusable, requires a new trial. Weighed by the non-specific request standard, *Agurs, supra*, obviously does not require a new trial here for reasons I will discuss below. If we assume that this request gave the prosecutor notice of exactly what the defense desired, however, the necessity for a new trial has not been demonstrated, and, for reasons set forth below, the procedure mandated by the opinion to determine that question appears to me to be ill-advised.

Let us return to the question whether the requests were specific in the *Agurs* sense; i.e., that the material requested exists and that the request told the prosecutor exactly what the defense desired. I assume that there was a net worth investigation, that annual balance sheets of the kind customarily prepared in such investigations exist for the years 1974 and 1975, and that they may show: (a) no increase in net worth for each year not reflected in reported income or non-taxable income; (b) some increase in net worth not reflected in reported income or non-taxable income, but an increase amounting to substantially less than $15,000 each year; (c) similar increases in net worth equal to or in excess of $15,000. Analyses of the kind mentioned in (a) and (b) would tend to indicate that there is no unreported income that resulted in a net worth increase, but they would not disprove the receipt of income that was taxable and disbursed for purposes that did not result in an increase in net worth.

The value of the net worth analysis lies in proving the positive, not the negative: an increase in net worth not accounted for leads inescapably to the conclusion that there was income to enhance the taxpayer's worth, but the absence of a

net worth increase does not have the same force in proving that all income was reported.

The evidence here is overwhelming that $15,000 in cash was put in the defendant's hands each year. The defendant virtually admits it. The defense was simply that the money was not income to him and he was merely a courier who carried the bag. Of course, we do not know, as my brethren say, what might be in the materials requested that would negate the receipt of $15,000 in unreported income each year. Let us conjecture: if the defendant received $15,000 each year and spent it for personal purposes, the result would not be reflected in his net worth at the end of either year. If, for example, he gambled all or part of it away, or spent it, at his own discretion, to benefit public officials, or expended it on personal extravagances, a net worth analysis showing that he had no unreported increase in net worth, or an unreported increase in net worth to a sum less than $15,000 would not per se negate his receipt of $15,000 each year as income. The audit might demonstrate fiscal rectitude in other regards, but there were character witnesses aplenty to testify to the defendant's general impeccability.

The request was not for the balance sheets for 1974 or 1975. It was not for income reconstructions. It sought to put on the prosecutor the task of evaluating what might exist that would achieve the end of exonerating the defendant. Much travail would have been saved, and likely nothing lost to the government, had the prosecutor either produced what the government had, *Cannon v. Alabama*, 5 Cir. 1977, 558 F.2d 1211, 1213, or responded by indicating the nature of the material in his possession and asking that the request be made specific so that he could determine his duty. The Supreme Court has said in *Agurs, supra*, 427 U.S. at 108, 96 S.Ct. at 2399, 49 L.Ed.2d at 352, "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure." But this was not done, and the failure by the government thus to cure what



appears to be a lack of the necessary particularity in the request should not occasion a new trial.

No evidence is admissible unless it is relevant, Rule 402, Federal Rules of Evidence, and that means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Rule 401, *id.* *See also* McCormick on Evidence, § 185 at 437 (2d Ed. 1972). If, however, a prosecutor fails, even in response to a specific request, to adduce the evidentiary material requested, a new trial is not automatically granted: the test is not whether the material was *admissible*, that is not merely relevant, but, whether it "is *material*, or indeed [whether] a substantial basis for claiming materiality exists." *United States v. Agurs, supra*, 427 U.S. at 106, 96 S.Ct. at 2399, 49 L.Ed.2d at 351. Because the actual holding in *Agurs* deals with the duty to produce exculpatory evidence in accordance with the "defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution," *id.*, 427 U.S. at 107, 96 S.Ct. at 2399, 49 L.Ed.2d at 352, we cannot automatically apply its standard here: but we now know that, in such cases, a new trial must be granted "if the omitted evidence creates a reasonable doubt that did not otherwise exist, . . . ." 427 U.S. at 112, 96 S.Ct. at 2401, 49 L.Ed.2d at 355. Presumably, the test is less stringent if there is a request for specific material, the material in fact exists, and is not produced. But nothing in *Brady, supra*, or in *Agurs, supra*, or in Rule 16 makes even the willful failure to produce every item of requested relevant material *ipso facto* ground for reversal.

In *United States v. Anderson*, 5 Cir. 1978, —— F.2d ——, slip p. ——, May, 1978, Judge Hill discusses the various failure-to-disclose situations. It is unnecessary to repeat that excellent summary here. Let me assume, however, that the requests were specific in the sense that *Agurs, supra*, defines that term. It appears to be implicit in the *Agurs* rationale that, even if the prosecution's failure was inexcusable, this does

not necessarily require a new trial. There must be some showing that the suppressed evidence might have affected the outcome of the trial. Presumably, the test to be applied would be the same test that applies if the prosecutor fails to comply with a request for discovery made in accordance with Rule 16, Federal Rules of Criminal Procedure; it must be shown that the defendant was prejudiced by the nondisclosure. *United States v. Ross*, 5 Cir. 1975, 511 F.2d 757, 764; *United States v. James*, 5 Cir. 1974, 495 F.2d 434, 436; *United States v. Saitta*, 5 Cir. 1971, 443 F.2d 830, 831. In this respect, I agree with the criterion adopted by my brethren as sufficient to show prejudice: it must be shown that the material "might have affected the outcome of the trial."

But the mandate does not confine itself to directing the trial judge to search for the specific items requested, to determine whether they exist, and, if so, whether prejudice resulted from their non-production. It directs a general search for "exculpatory evidence that is material to the guilt, or to the punishment of appellant, and which might have affected the outcome of the trial." It thus embraces both specific items and general exculpatory material, non-production of which results in a new trial only if "the omitted evidence creates a reasonable doubt that does not otherwise exist." *Agurs, supra*, 96 S.Ct. 2401. Therefore, it directs a search for two different kinds of material and adopts the same standard for both.

Moreover, the mandate of my brethren requires the trial judge to examine documents in camera. A net worth investigation produces prodigious quantities of paper; the task of examining it is substantial. Assuming the utmost of industry, not every trial judge is capable of assimilating this data, which is based essentially on accounting concepts.[1] More important, even after trial, the judge does not know all of the possible theories of a case or all of the ways data in one party's hands

1. As it happens here, this experienced trial judge has unusual capabilities in this respect; he has a degree in accounting and actually worked as an accountant while attending law school.



might be used when combined with data available to the other side. What may seem insignificant to a judge may be of great potential value to an advocate; once he knows what the facts are, a lawyer may be able to demonstrate that what is apparently unimportant is, in fact, material. The converse is also true: given a chance to argue the point, the prosecutor may be able to show that what appears significant is of little real probative worth. In the interests of due process, and the opportunity of both the defendant to evaluate the evidence that may be helpful to him (as well as to confront the witnesses against him), as well as in the interest of affording the prosecutor a chance to brief and argue its case, I would require no more in camera duties of trial courts than those that are indispensable.

Therefore, I would simply affirm the conviction. The defendant may yet file a motion for post-conviction relief under Section 2255. He may pursue this motion with such discovery devices as are available.[2] The inquiry may then be more directly focused, the subjects more specific, and the evidence may be viewed by the defendant, not merely by the court. Each side will also have a chance to be heard on the issues. Where this has been done, and due process afforded both sides, not in camera but in open court, the trial judge may determine whether there should be a new trial.

For these reasons, I respectfully DISSENT from the remand and the mandate to the trial judge.

2. The trial judge in his discretion may allow the use of those discovery devices applicable to civil and criminal proceedings. *Harris v. Nelson*, 1969, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281; *Ferrara v. United States*, 5 Cir. 1977, 547 F.2d 861; *United States ex rel. Seals v. Wiman*, 5 Cir. 1962, 304 F.2d 53. *See also* Rules Governing Section 2255 [28 U.S.C. § 2255] Proceedings, Rule 6, Act Sept. 28, 1976, P.L. 94-426, § 1, 90 Stat. 1334.